No. 96-7171

In The

Supreme Court of the United States

October Term, 1996

RANDY G. SPENCER,

Petitioner,

v.

MICHAEL L. KEMNA and
JEREMIAH W. (JAY) NIXON,

Respondents.

On Writ of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR PETITIONER

INGLISH & MONACO, P.C.

JOHN WILLIAM SIMON
Counsel of Record

DAVID G. BANDRÉ
237 East High Street
Jefferson City, Missouri 65101
(573) 634-2522

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I. Whether a state attorney general's office and a district court may delay the response and disposition in a habeas corpus action until the petitioner's claim is arguably moot, then rely on the asserted mootness resulting from their delay to deny relief.

II. Whether the court below erred in holding that a habeas corpus petition challenging a parole revocation is "moot," when the petitioner was undisputedly in custody as a result of the revocation when he filed the petition, and when state and federal law render the petitioner liable to testimonial impeachment and sentence enhancement as a result of the revocation.

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BRIEF FOR PETITIONER

Petitioner, Randy G. Spencer, prays the Court for its order reversing the judgment of the court below, which affirmed the district court's denial, as moot, of his petition for a writ of habeas corpus.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit appears at 91 F.3d 1114 (8th Cir. 1996). J.A. 131-39. The one-page order of the district court is unreported. J.A. 130.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit entered the judgment to be reviewed on August 2, 1996. J.A. 131-39. Petitioner filed a timely petition for rehearing, with suggestions for rehearing en banc. J.A. 4. That court denied rehearing on September 19, 1996. J.A. 140. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, to the extent it has been invoked in the court of appeals, that: "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . "

Subsection (a) of 28 U.S.C. § 2254 provides, in relevant part, that "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on

the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Local Rule 13.C. of the Rules of United States District Court for the Western District of Missouri provides as follows:

> *Suggestions in Opposition.* Within twelve (12) days from the time the motion is filed, each party opposing the motion shall serve and file a brief written statement of the reasons in opposition to the motion.

STATEMENT OF THE CASE

On June 3, 1992, Randy Spencer was on parole from two sentences of three years for burglary in the second degree and stealing over $150. J.A. 65-70. According to a parole violation report, there was a police report which said that on June 3, 1992, Spencer met a woman at a crack house; that after smoking crack cocaine, she drove Spencer home and went into his apartment with him; and that he raped her, and had her drive him back to the crack house. J.A. 71-76.

On July 16, 1992, officers of the Kansas City, Missouri, Police Department detained Spencer on a "twenty-hour hold" in connection with the alleged rape of the woman from the crack house. J.A. 72. The next day, Spencer's parole officer issued a warrant for his arrest, charging that he had violated two conditions of his parole by committing the crime of rape, and by possessing and using crack cocaine. J.A. 112. The parole officer interviewed Spencer, and tendered him a waiver of a preliminary revocation hearing on the two alleged violations. According to Spencer's undisputed account of the interview, the officer told him that the waiver was "only a formality." J.A. 81. Spencer signed the waiver. J.A. 114.

The parole officer reported that Spencer had been convicted of sodomy in 1983, had received a sentence of imprisonment for five years, and was a "registered sex offender." J.A. 75. Nonetheless, the parole officer recommended that the Board of Probation and Parole continue Spencer on parole pending the prosecutor's decision whether to charge him with raping the woman from the crack house. J.A. 75-76. No prosecutor has charged Spencer with any of the acts the parole officer accused him of committing.

On August 6, 1992, the parole officer issued a report charging Spencer with a third violation of his parole: using a dangerous weapon. The violation report said the police report said the woman from the crack house said that Spencer had "pressed" a screwdriver against her side, but that she "wasn't clear at what point that happened." J.A. 74-75. Spencer did not execute a waiver of a preliminary revocation hearing on this third accusation, nor was he given the opportunity to do so. J.A. 82 (¶ 13).

On August 25, 1992, Spencer was transferred from the local jail to the Department of Corrections. J.A. 67 & 84 (¶ 16). On September 14, 1992, an institutional parole officer told him that his final revocation hearing would be in ten days; that he was responsible for obtaining any witnesses he wanted to call at the hearing; and that he could have one stamp and one telephone call with which to do so. J.A. 84-85 (¶ 19). Relying on a state parole regulation to the effect that persons accused of parole violations "may have a representative of their choice" at the final revocation hearing, Spencer requested the presence of an inmate paralegal at the institution; the Board denied the request. J.A. 117.

At the hearing on September 24, 1992, the State called no witnesses. It presented no "evidence" besides the violation report. At no point was Spencer afforded the opportunity to cross-examine either his accuser or those who reported her out-of-court statements or the person who claimed Spencer confessed to having smoked crack cocaine. On the rape and armed criminal action accusations, the only "evidence" that Spencer had violated the terms of his parole were (1) the out-of-court statements of the parole officer as to (2) the out-of-court statements of unnamed police officers as to (3) the out-of-court statements of Spencer's accuser as to (4) what she recalled happened when she was smoking crack cocaine. On the drug accusation, the only evidence was the parole officer's out-of-court statement that Spencer had admitted smoking the substance – which Spencer denied. J.A. 89-90 (¶¶ 33-34) & 91 (¶ 37).

The Board revoked Spencer's parole, relying on all three of the asserted violations. J.A. 55-56. It expressly based its findings on the initial violation report: "Evidence relied upon for violation is from the Initial Violation Report dated 7-27-92." J.A. 56.

Spencer did not receive a copy of the order revoking parole and setting forth the Board's basis for doing so until four months after the hearing. J.A. 98 (¶ 55) & 117-18. At that time he also received notice that the Board had "automatically" extended his incarceration from his "conditional release" date of October 16, 1992, to his maximum release date of October 16, 1993, *before* the hearing on the revocation – solely on the basis of the violation report. J.A. 99-104, 116 & 119-20. *See* Mo. Rev. Stat. § 558.011.4-5 (Supp. 1992) (defining "conditional release" and prescribing procedure to be followed in extending it). Subsequently the State mitigated the effect

of this action by finding Spencer eligible for statutory "good time," Mo. Rev. Stat. § 558.041 (Supp. 1992), allowing him to be released on parole once more on August 7, 1993. J.A. 50.

Spencer presented his constitutional grievances concerning the parole revocation in habeas corpus petitions before the circuit court of the county in which he was then a prisoner, before an intermediate appellate court, and before the Supreme Court of Missouri. J.A. 8-10, 39, & 104-06. All three courts denied relief.

Three days after the Supreme Court of Missouri denied relief, Spencer executed an application for a writ of habeas corpus from the United States District Court for the Western District of Missouri. J.A. 10 & 16. Spencer raised four grounds for relief:

1. The Board denied him his right to a preliminary revocation hearing on the armed criminal action accusation, in that he had a right to such a hearing and did not waive it as to this additional accusation.
2. The Board denied him a hearing on the cancellation of his conditional release date.
3. The Board denied him the minimum due process rights concerning his final revocation hearing, in that:
   a. It denied him the right to confront and cross-examine any of the witnesses against him, but relied solely on the out-of-court statements in the initial violation report.
   b. It gave him no notice that the entire case for revoking his parole would be the out-of-court statements in the violation report.
   c. It denied him the right to representation by a person of his choice.

> 4. The Board failed to apprise him of the fact of its decision to revoke his parole, and of the evidence it relied on in doing so, for four months, when its regulations required that such a statement be prepared within ten working days of the hearing, and that the parolee be provided this statement within ten working days from the date of the decision.

J.A. 12-14.

On April 1, 1993, the district court filed the application, and consigned the case to the Pro Se Office of the clerk of that court. J.A. 1. On April 5, 1993, the district court directed Spencer to file an affidavit establishing his in forma pauperis status; he did so three days later. Dist. Ct. Doc. Nos. 2-3. Nearly a month later, the district court ordered the respondents to file an answer within thirty days of its order. J.A. 17-18.

On May 1, 1993, an Assistant Attorney General filed a motion for extension of time to file the respondents' answer to the district court's order. J.A. 19-20. The motion recited the following reason:

> That counsel has, within the past weeks, filed numerous responses in federal habeas corpus cases, written and filed numerous briefs, and prepared for and made several oral arguments in the various courts in the State of Missouri. Due to this litigation, respondent has been delayed in the completion of his brief in the above-styled case.

J.A. 19.

Under Local Rule 13.C. of the United States District Court for the Western District of Missouri, Spencer had an initial period of twelve days in which to respond to this motion. Because the respondents' counsel served the motion on Spencer by mail, Spencer had an additional

three days in which to respond. Fed. R. Civ. P. 6(e). Spencer's response was therefore due fifteen days after service of the respondents' motion. Spencer filed his response on June 8, 1993 – a week after the respondents filed their motion. J.A. 1 & 22-25. On June 3, however, the district court had granted the respondents' motion by signing their draft order. J.A. 21.

Respondents' first motion for extension of time had sought, and obtained, an additional twenty-one days. On Day 21, however, a second Attorney General entered his appearance as counsel for the respondents. J.A. 28-29. The same day, he filed a second motion for extension of time – seeking an additional fourteen days. Like his predecessor, the second Assistant Attorney General pleaded:

> That counsel has, within the past weeks, filed numerous responses in federal habeas corpus cases, and has written and filed numerous briefs in the Eighth Circuit Court of Appeals and has prepared for and made several oral arguments in the Eighth Circuit. Due to this litigation, respondent has been unable to complete the response in the above-styled case[.]

J.A. 26. Once more, Spencer filed a timely objection – pointing out that in both instances the successive attorneys for the respondents had waited until the last day to file their motions for additional time, when in fact the generalized reasons they pleaded were, if true, known to them well in advance. J.A. 30-35. The same day, the district court issued a form order granting the extension. J.A. 36.

On the last day allowed for filing an answer – July 7, 1993 – the respondents filed a response noting that "petitioner has been scheduled for parole release on August 7, 1993." Respondents observed, as well, that "petitioner

will complete the service of his entire term of imprisonment on October 16, 1993." J.A. 37 n.1.

A week after the respondents filed their answer, Spencer filed a reply – starting and finishing by calling the district court's attention to the impending date of his release, and to the threat that his grievances would be held moot. J.A. 78-80 & 110. Spencer addressed the respondents' answer by buttressing his petition with exhibits, with discussions of this Court's decisions in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and with citations to several lower-court decisions applying these precedents. J.A. 78-111.

The day after Spencer filed this pleading, the district court ordered him to file a "reply" to the respondents' response on pain of dismissal. J.A. 121. On July 22 Spencer wrote the district court a letter, and on July 26 he filed a pleading, pointing out that his pleading of July 14 had included a reply to the respondents' response. J.A. 122-25.

On August 7, 1993, the State released Spencer on parole. J.A. 37 n.1. On August 13, 1993, he filed a notice of change of address indicating that he was no longer in prison. J.A. 126. On October 16, 1993, the full term of his concurrent sentences for burglary and stealing expired. J.A. 37 n.1 & 65-67.

On February 3, 1994, the district court issued a one-paragraph order "not[ing]" that Spencer had filed his pleading of July 14, 1993, in which he had sought an adjudication of his parole-revocation claims before he was released on parole again and before his entire sentence had expired. The order recited that "[t]he resolution

of this case will not be delayed beyond the requirements of this Court's docket." J.A. 127.

On August 23, 1995 – over two years and four months after Spencer filed his application – the district court issued a one-page order denying relief. Relying on the respondents' response concerning Spencer's then-forthcoming release on parole, it held that Spencer's grievances had become moot. J.A. 130. On October 5, 1995, the district court summarily denied Spencer's application for a certificate of probable cause – reciting that "this case presents issues which are not deserving of appellate review[.]" J.A. 128-29.

The United States Court of Appeals for the Eighth Circuit granted a certificate of probable cause. By the time of the appeal, Spencer was once more in the Missouri Department of Corrections on an unrelated charge of attempted stealing over $150. Respondents' Brief in Opposition to Certiorari (BIO) at 3. On appeal, Spencer argued, first, that the respondents should not be allowed to avoid his grievances on the ground of mootness, because the respondents' delays contributed to the alleged mootness; second, that Spencer's case fell within an established exception to the principle of mootness where the public interest requires that an issue be decided notwithstanding its apparent mootness in an individual's case; and third, that Spencer's grievances were not moot, because under the facts and circumstances of his case, the past revocation of his parole would make it less likely for him to receive parole consideration again.

The panel of the court below held that under this Court's decision in *Lane v. Williams*, 455 U.S. 624 (1982), the ongoing consequences of Spencer's parole revocation

were "too speculative to overcome a finding of mootness." J.A. 134-37. It found that there was not a "reasonable likelihood" that Spencer would "once again be affected by the Board's revocation procedures." J.A. 138. At no point in its opinion did the panel address the strategic delay grievance which Spencer had repeatedly raised pro se, and which had been appointed counsel's first argument on appeal. J.A. 131-39. In a separate opinion, Senior Judge Heaney characterized it as "unfortunate" that Spencer's claim had been mooted by delays in the district court, and observed that his case "highlights the necessity of making prompt decisions in revocation cases." J.A. 138-39.

Spencer filed a petition and suggestions, seeking rehearing and rehearing en banc. J.A. 4. He emphasized the panel's failure to address the strategic delay issue. On September 19, 1996, the court below denied rehearing and rehearing en banc. J.A. 140.

This timely certiorari proceeding followed.

SUMMARY OF ARGUMENT

This Court has granted certiorari to decide whether a habeas corpus action attacking a parole revocation becomes moot when the petitioner is released on parole again while the action is pending, when the district court's consideration of the petition is delayed through no fault of the petitioner.

In his federal habeas corpus petition, Spencer challenged the State of Missouri's revocation of his parole without affording him the right to a preliminary revocation hearing on the most serious of the accusations against him, and without allowing him to cross-examine any of the witnesses against him. Respondents sought

extensions of time to file their response, and reassigned the case among attorneys, until the petitioner was one month away from being released on parole again. Both parties apprised the district court of Spencer's imminent re-release. It did not render a decision until Spencer had served the *entire sentence* under which he had been on parole when the State initiated the revocation proceedings. The district court then dismissed the action as moot. When Spencer appealed the dismissal, the court below refused to address his grievance concerning the respondents' and the district court's outcome-determinative delay. It held that the prejudice the revocation would cause him in future parole considerations did not overcome the "mootness" the respondents and the district court had created.

I. By delaying this petitioner's case until he had served the entire sentence, the respondents and the district court denied him the right to a remedy that Congress provided him in enacting 28 U.S.C. § 2254.

In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), this Court held that habeas corpus is a state prisoner's "sole federal remedy" for violations of federal constitutional rights affecting the fact or duration of his or her custody. In doing so, it held that state prisoners could not raise such claims under 42 U.S.C. § 1983 without first having litigated them in federal habeas corpus – which requires exhaustion of available, non-futile state remedies.

The lower courts allowed the respondents to delay a federal habeas corpus action involving a constitutional violation in the parole revocation process until after the parolee had served his sentence. This practice leaves a citizen *no* effective federal remedy for the violation of

federal constitutional rights in the revocation of probation or parole.

II. A probation or parole revocation has collateral consequences that defeat a claim of mootness.

In *Carafas v. LaVallee*, 391 U.S. 234 (1968), this Court held that a petitioner's attack on a conviction does not become moot if the sentence expires while the habeas corpus action is pending, when the conviction has "collateral consequences" that give the petitioner " 'a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.' " *Id.* at 237 (internal citation omitted). In *Sibron v. New York*, 392 U.S. 40, 57 (1968), this Court created a presumption that if a prisoner completes his or her sentence while a habeas corpus action is pending, the action is not moot. In *Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985), this Court cited as alternative "collateral consequences" defeating a claim of mootness "the possibility that the conviction would be used to impeach testimony [the petitioner] might give in a future proceeding and the possibility that it would be used to subject him to persistent felony offender prosecution if he should go to trial on any other felony charges in the future."

In Spencer's case, the finding of the Board of Probation and Parole has substantial, non-speculative statutory consequences. In addition to facing the testimonial impeachment and sentence enhancement consequences this Court relied on in *Evitts*, he is subject to Fed. R. Evid. 413, under which the "fact" of the "forcible rape" for which the Board revoked Spencer would be admissible if he were ever charged with a federal sex offense. Under *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), he cannot proceed with an action under section 1983 concerning

this revocation unless he receives a judgment in his favor in the habeas corpus action. Although Spencer need not rely on future parole treatment as a collateral consequence, one need not speculate to conclude that a parole board would take into account a finding it had made – on the basis of its own staff's report – that Spencer had committed two violent felonies while he was at large on parole.

In *Lane v. Williams*, 455 U.S. 624 (1982), this Court declined to apply the *Sibron* presumption to two Illinois petitioners who had been on parole, and who attacked their sentences without attacking either their underlying convictions or the revocation of their parole. Two years after this decision, Congress enacted the Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 2017, which led to the establishment of the Federal Sentencing Guidelines. 28 U.S.C. § 994(a)(1). The court below erred in relying on *Lane* to hold Spencer's action moot, because the facts of his case are substantially dissimilar from those in *Lane*, and because the law affecting the use of probation and parole revocations has changed since that decision.

Allowing the respondents and the district court to delay the disposition of Spencer's federal habeas corpus action until his sentence of incarceration had expired, then holding that his claim is "moot," allows respondents to whipsaw probationers and parolees between section 2254 and section 1983. The effect is to deny them any federal forum for the vindication of federal constitutional rights. Such a result is inconsistent with sections 2254 and section 1983, and with this Court's precedents construing them. The judgment should be reversed.

ARGUMENT

I. A state attorney general's office and a federal district court may not delay a state prisoner's habeas corpus action challenging his parole revocation until his underlying sentence has expired, then defend the dismissal of the action as "moot."

In the first of the two points on which this Court granted certiorari, Spencer demonstrates that this Court's established jurisprudence of federal remedies for federal constitutional violations in the probation and parole revocation process requires that district courts handle such cases expeditiously. Spencer shows that the respondents and the district court have failed to meet this Court's expectations for federal habeas corpus actions. Allowing the respondents to delay their response until a month before they were going to re-parole the petitioner anyway – then holding the petition moot on his discharge from the underlying sentence – denies the petitioner the opportunity for judicial redress that Congress and this Court intended the district court to provide. If the respondents' and the district court's treatment of Spencer's case is not a sufficient ground for reversal, then the Court should *either* hold that the petitioner's claims remain alive after his re-parole and discharge, *or* create an exception to the exclusivity of habeas corpus as a federal remedy for constitutional violations affecting the fact or duration of a person's confinement.

A. *Preiser v. Rodriguez* and its progeny require the district courts to resolve habeas corpus challenges to probation or parole revocations speedily, lest the petitioner be denied any federal remedy at all for federal constitutional violations in respect to the revocation.

In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), this Court held that habeas corpus is the "sole federal remedy" for state prisoners' challenges to the fact or duration of their custody. *Id.* at 499-500. In *Preiser*, three prisoners challenged the denial of "good-time" credits as a result of disciplinary proceedings; they had sought to challenge the denial in an action under 42 U.S.C. § 1983, which would not have required them to exhaust their state remedies. This Court rejected their effort, relying on the capability of federal district courts to process habeas corpus actions more speedily than section 1983 actions: "once a state prisoner arrives in federal court with his petition for habeas corpus, the federal habeas corpus statute provides for a *swift*, *flexible*, and *summary* determination of his claim." 411 U.S. at 495 (emphasis supplied) (citations omitted). It reasoned that once a prisoner has unsuccessfully presented his or her federal claims to the state courts, the federal courts would address these claims speedily:

> Federal habeas corpus . . . serves the important function of allowing the State to deal with the[ ] peculiarly local problems [of corrections administration] on its own, while preserving for the state prisoner an *expeditious* federal forum for the vindication of his federally protected rights, if the State has denied redress.

Id. at 497-98 (emphasis supplied).

Spencer did not challenge the denial of "good time" credits, but the revocation of his parole. This claim is

cognizable in federal habeas corpus. *Morrissey v. Brewer*, 408 U.S. 471 (1972). Because he attacked the fact or duration of his confinement, rather than the conditions of his confinement, *Preiser* left him no other federal remedy.

In Spencer's case, the district court allowed the respondents to delay a response virtually until the eve of Spencer's re-release on parole, then *itself* delayed the case for over two years. When Spencer objected on appeal to the use of this delay as the basis for a finding of "mootness," the court of appeals refused to address the issue. None of this is the performance this Court relied on in *Preiser*.

By granting leave to proceed in forma pauperis and by granting a certificate of probable cause, respectively, the district court and the court of appeals recognized that Spencer had presented one or more non-frivolous claims of Fourteenth Amendment due process violations concerning his parole revocation. No federal court has addressed the merits of his grievances. Neither the district court nor the court below addressed the merits of his grievances because the district court allowed the respondents to delay their answer until a month before Spencer was due for release for good behavior, then delayed its disposition until the sentence had expired. J.A. 37 n.1 & 130.

In moving for enlargements of time adding up to five weeks beyond the thirty days the district court initially allowed them, the respondents' counsel cited no particular facts justifying the delay – even though they should be charged with knowledge of Spencer's impending reparole. *Cf. Griffini v. Mitchell*, 31 F.3d 690 (8th Cir. 1994) (pro se prisoner charged with knowledge of data on corrections department "face sheet" whether or not he received it). In their motions, both of the respondents'

counsel in the district court used substantially the same conclusory boilerplate. It did not allow the district court to confirm their excuses by reference to cases before it and other courts. Respondents gave no reason for reassigning the case from one attorney to another. J.A. 19 & 26-27. Although Spencer filed timely objections to these motions, the district court granted them without waiting for his responses. J.A. 21, 36 & 77.

By allowing the respondents to delay the case until the eve of their re-release of the petitioner, the district court's handling of this claim allowed the respondents to use their official position to secure an outcome in their favor. *See Dr. Bonham's Case*, 8 Co. Rep. 114a (C.P. 1610) (against "common right and reason" for official body to keep half of the fines it imposed for failure to obtain license from it or abide by its charter). *See also Edwards v. Balisok*, 1997 WL 255341, *4 (U.S. May 19, 1997); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

Recently the political branches have sought to limit the occasions on which a prisoner may seek relief in federal habeas corpus. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1218 (AEDPA). Even in the recently-limited statutes, no provision suggests that a respondent may delay a response until the eve of a prisoner's release, then rely on mootness as a defense to a non-frivolous federal constitutional grievance. One of the reasons for enacting AEDPA's restrictions on habeas corpus was the concern of *respondents* in habeas corpus actions that prisoners were avoiding the just disposition of their cases by dilatory tactics. When respondents rather than petitioners engage in such conduct, they should not be rewarded. In *Chitwood v. Dowd*, 889 F.2d 781, 784-85 (8th Cir. 1989), for example, the court below excused a Missouri prisoner from

exhausting state remedies when "Missouri state officials . . . disregarded, if not deliberately, at least negligently, the rights of a prisoner who sought the proper execution of his sentence," but who "faced roadblocks at every turn" despite his "continual good faith effort to bring his petition before the proper forum." The court below fails to explain why the result should be different when the delay occurs on a federal court's watch.

B. Neither the respondents nor the lower courts have a right to manipulate federal habeas corpus actions challenging probation or parole revocations so as to deny to probationers and parolees the benefits of the writ of habeas corpus.

In *Young v. Harper*, 117 S.Ct. 1148 (1997), this Court rebuffed an attempt to deny parolees the rights this Court recognized in *Morrissey* by calling their status "pre-parole" when it had only "phantom differences" from the status the Court had addressed in *Morrissey*. Respondents should receive the same response in this case: creating delay by shifting a case around among attorneys, or exploiting delay by the federal court, with the effect that no federal court addresses the merits of the petitioner's claims is just as evasive of the constitutional duties of the respondents as the conduct this Court exposed in *Young*.

In their brief in opposition to certiorari (BIO), at 4-5, the respondents cited an extra-record "study" to the effect that "the mean processing time in federal district courts nationwide for habeas petitions containing more than three grounds is 359 days." From this "fact," the respondents drew the conclusions that "[i]t was impractical to fully litigate petitioner's claim before it became moot . . . ," and "[m]ootness was inevitable." BIO 5.

The bulk of federal habeas corpus petitions are in *no danger* of becoming moot during the time the district courts spend on them. Most federal habeas corpus petitions attack sentences of imprisonment for felonies, in which the petitioner's earliest conceivable release date is well past the time it is likely to take to litigate their habeas corpus action.

Three kinds of federal habeas corpus petitions do *not* fall into this category: those attacking (a) death sentences, (b) extraditions and interstate transfers under the Interstate Agreement on Detainers, and (c) probation and parole revocations. Unlike challenges to sentences of imprisonment, all three of these categories of petitions call for special attention lest the litigation process render the Great Writ a dead letter.

District courts must treat these three categories of habeas corpus actions separately from the mass of such petitions at least where, as here, the petition and the pleadings and correspondence from both sides apprise the district court of the special time considerations. Whereas a stay can adequately preserve the rights of both parties in the execution and interstate transfer situations, only a disposition within the time remaining before the petitioner is re-paroled or discharged can do so in the probation or parole revocation situation: a stay of the petitioner's release would aggravate rather than mitigate the violation of constitutional rights which is at issue.

In the instant case, the district court could and should have resolved Spencer's parole revocation claims before the respondents re-released him. At this point, the least that should be done is to reverse the lower courts' holding of mootness.

C. If there were no right to a disposition of a federal habeas corpus challenge to a probation or parole revocation before the petitioner has served the entire sentence under which he or she was on probation or parole, then the petitioner *should* have a right to challenge the revocation under 42 U.S.C. § 1983, but *does not* have such a right in light of this Court's decision in *Heck v. Humphrey*.

It is neither "impractical" to dispose of such petitions in less than 359 days, nor "inevitable" that district courts will allow them to become moot. In *Preiser* the Court based its refusal to allow prisoners to bring such claims under section 1983 on the federal courts' ability to handle habeas corpus petitions in a "swift, flexible, and summary" or "expeditious" manner. 411 U.S. at 498 & 491.

If Spencer and other citizens whose probation or parole is revoked less than 359 days before their sentences expire have no right to federal habeas corpus relief for federal constitutional violations in the revocation process, then these citizens should be able to proceed to an action under section 1983 without running afoul of *Preiser*. Yet such a development would involve the repudiation of recent decisions expanding on the *Preiser* doctrine.

In *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), this Court held that *Preiser* precluded an action for damages if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence . . . unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." For a state prisoner, the only federal vehicle for invalidating such custody is an action for habeas corpus. In *Edwards v. Balisok*, No. 95-1351, 1997 WL 255341, at *3-*5 (U.S. May 19, 1997), this Court applied *Preiser* to bar an action for damages

and declaratory relief for the denial of "good time" credits on the basis of a prison disciplinary proceeding. Because the principal due-process violation the prisoner alleged "would, if established, necessarily imply the invalidity of the deprivation of his good-time credits," this Court held that the petitioner's damage and declaratory claims were not cognizable under section 1983.

Spencer's grievance concerning the parole revocation would, if accepted, invalidate the custody flowing from it. Under *Heck* and *Edwards*, a person in Spencer's position could not have raised his claims under section 1983 until after litigating a federal habeas corpus action to oust the parole revocation. Indeed, the court below reads *Heck* to hold that a person in Spencer's position must not only litigate a federal habeas corpus action, but must *prevail* in it, as a "prerequisite" to litigating a section 1983 claim that "hinges on" the same confinement. *Leonard v. Nix*, 55 F.3d 370, 373 (8th Cir. 1995).

Yet once the person has exhausted state remedies, he or she must receive the "expeditious" treatment this Court expected the federal courts to provide, or the immediate confinement flowing from the challenged revocation will have expired. Under the theory that the court below has advanced, if the respondents and the district court delay a prisoner's federal habeas corpus long enough, the prisoner will not only lose his or her remedy under section 2254, but any remedy he or she might have had under section 1983.

Spencer does not believe that this Court would tolerate state or federal officials' whipsawing prisoners – denying them section 1983 relief on the one hand, and habeas corpus relief on the other, with the effect that there is no federal remedy at all for federal constitutional violations in probation or parole revocations. Yet that

would be the effect of the conduct of the respondents and the district court in this case. Either this conduct must stop, or this Court must doubt the continuing validity of *Preiser* and its progeny.

D. Abuses by other prisoners do not justify eliminating Spencer's opportunity to seek federal judicial relief.

As a result of the State's violation of his rights, Spencer has a parole revocation record for forcible rape and armed criminal action based on triple hearsay of a declarant who was voluntarily under the influence of crack cocaine at the time of the alleged events which the intervening declarants say she purported to perceive, recall, and narrate. Spencer did not waive a preliminary hearing on the accusation that gave the alleged parole violation its most ominous legal consequences: using a dangerous weapon. J.A. 82 (¶ 13). Respondents attempt to justify their delay and the district court's by citing more extra-record numbers to the effect that Missouri prisoners have a "litigious nature." BIO-5-6. In light of the undisputed facts of this case, it should come as no surprise – and should be no credit to the respondents – if Missouri prisoners seek federal relief at a higher rate than those in other jurisdictions. This case illustrates why the Framers sought to guarantee to themselves and their posterity the protection of the Great Writ with only the exceptions the Constitution allows. U.S. Const. art. I, § 9, cl. 2.

Even if a large number of prisoner petitions are frivolous or otherwise insubstantial, that is no excuse for causing petitions like Spencer's to become moot through no fault of the petitioner. In *Haley v. Dormire*, 845 F.2d

1498 (8th Cir. 1988), the same prisoner had filed approximately fifty federal complaints before the same district court. When he filed eight more, the district court dismissed them as frivolous without ordering the defendants to show cause or otherwise respond. The court below reversed, holding that a prisoner's *own* record of filing large numbers of lawsuits did not mean that any given future lawsuit was frivolous. In Spencer's case, the time-sensitivity of this petitioner's claims appeared on the face of the petition; both he and ultimately the respondents communicated this sensitivity to the district court. Respondents and the district court cannot point to *other* prisoner's filings to excuse their own treatment of Spencer's application in a manner that they *knew* would deny him many of the benefits the Framers, the Congress, and this Court have intended to flow from the availability of the writ of habeas corpus.

To allow a state attorney general's office and a district court to delay a prisoner's challenge to his parole revocation until his entire sentence has expired, then dismiss his claim and defend the dismissal as "moot," is not the "accepted and usual course of judicial proceedings," but a perversion of these proceedings – delaying justice in order to deny it. Such behavior undercuts the basis of *Preiser v. Rodriguez* by failing to meet this Court's expectation of "expeditious" handling of federal habeas corpus petitions. The court below failed to offer any excuse for the district court's behavior. The judgment must be reversed.

II. Spencer's action did not become "moot" when the respondents re-paroled him and discharged him from his sentence, because he faces serious collateral consequences of the official finding of wrongdoing from which he sought relief.

In the second point on which this Court granted certiorari, Spencer demonstrates, first, that this Court has recognized the collateral consequences of a criminal conviction as keeping a habeas corpus attack on it from becoming moot after the petitioner has served the sentence. These collateral consequences include loss of civil rights, liability to testimonial impeachment, and vulnerability to enhanced sentencing in any future criminal cases. Second, Spencer shows that the same collateral consequences are present in respect to probation and parole revocations. Third, he documents the collateral consequences of *his* parole revocation, which include *additional* collateral consequences such as the applicability of Fed. R. Evid. 413 and the preclusion of an action under section 1983. He shows that *Lane v. Williams*, 455 U.S. 624 (1982), is no obstacle to recognizing his right to proceed with his action, and that the weight of judicial authority applying *Lane* and the absence of legislative action on the issue supports his continued right to relief. Recognizing his continuing right to relief is necessary to prevent respondents and district courts from abrogating the constitutional rights of probationers and parolees.

A. Collateral consequences of criminal convictions suffice to prevent a holding of mootness of federal habeas corpus challenges.

1. Deprivation of civil rights, liability to testimonial impeachment, and eligibility for enhanced sentencing survive a petitioner's release from personal restraint, and give the petitioner a stake in the outcome of a habeas corpus action attacking the original custody that prevents mootness.

In *Carafas v. LaVallee*, 391 U.S. 234 (1968), this Court held that a federal habeas corpus petitioner's claim does not become moot if his or her sentence expires while the action is pending. This Court based its holding in part on the fact that Carafas's criminal conviction imposed "disabilities or burdens" such as a prohibition on engaging in certain businesses, loss of the right to vote, and ineligibility to serve on a jury. *Id.* at 237. These "collateral consequences" give the petitioner " 'a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.' " *Ibid.*, quoting *Fiswick v. United States*, 329 U.S. 211, 222 (1946).

On the basis of the language of section 2254 and the history of the Great Writ, this Court held that the critical time for determining whether the petitioner was "in custody" was when he or she filed the petition: "once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to the completion of the proceedings on such application." *Id.* at 238. Carafas's sentence expired while he was exhausting his state remedies and otherwise diligently pursuing the vindication of his federal constitutional rights: if he were denied relief because the process had lasted longer than the sentence itself, he would suffer "serious disabilities

because of the law's complexities and not because of his fault. . . . " *Id.* at 238.

In *Sibron v. New York*, this Court held that "a criminal case is moot only if it is shown that there is *no possibility* that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Id.* at 57 (emphasis supplied). Thus, *Sibron* creates a presumption that a criminal conviction has collateral consequences defeating a defense of mootness.

In *Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985), this Court gave alternative examples of the collateral consequences that prevent a constitutional challenge to a criminal conviction from becoming moot. In *Evitts*, the petitioner had been finally released from custody, and his civil rights had been restored, but he had not been pardoned. Consequently, this Court held:

> [S]ome collateral consequences of his conviction remain, including the possibility that the conviction would be used *to impeach testimony he might give in a future proceeding* and the possibility that it would be used *to subject him to persistent felony offender prosecution* if he should go to trial on any other felony charges in the future. This case is thus not moot. (Emphasis supplied.)

The collateral consequences the Court had relied on in *Carafas* were absent, but the petitioner had a "substantial stake" in the matter on the basis of testimonial impeachment and sentence enhancement. Although these consequences were "possibilit[ies]" rather than certainties, this Court cited them as sufficient to defeat a defense of mootness.

2. A petition is cognizable after the petitioner's release or discharge from custody so long as the petitioner *filed* it when he or she was subject to personal restraint as a result of the underlying finding of wrongdoing.

In *Maleng v. Cook*, 490 U.S. 488 (1989) (per curiam), this Court considered whether a prisoner was "in custody" under a 1958 conviction and sentence of imprisonment for twenty years, when he had not filed his petition until 1985, after the sentence it attacked had completely expired. This Court held that he was not, and did not consider collateral consequences a sufficient predicate for statutory subject-matter jurisdiction. It distinguished *Carafas* by pointing out that the time at which one must determine the existence of "custody" is the time when the petitioner files the petition. *Compare* 490 U.S. at 490-91 *with* 391 U.S. at 238.

Maleng does not question that collateral consequences suffice to defeat a defense of mootness. It is consistent with *Carafas* and *Evitts*. There is no dispute that Spencer timely filed his petition, and the putative "mootness" resulted from delay by *the same government officials who invoke the defense*. Whether or not the respondents and the district court were at *fault* for delaying Spencer's action until he was re-released on parole and discharged from the sentencing and conviction, the delay was attributable to them rather than to him. Under the reasoning of *Maleng*, they cannot rely on the delay they created to deny a remedy to the petitioner.

As this Court pointed out in *Garlotte v. Fordice*, 115 S.Ct. 1948 (1995), the *Maleng* decision reflected a concern that holding the collateral consequence of sentence enhancement to be a sufficient condition of "custody"

under section 2254 would read that requirement out of the statute: a prisoner could wait his or her entire life to file a petition. 115 S.Ct. at 1951-52. This Court pointed out that its decision in *Garlotte* would do nothing to promote delay, because "the habeas petitioner generally bears the burden of proof," and therefore "delay is apt to disadvantage the petitioner more than the State." *Id.* at 1952.

It serves the legitimate interests of both sides in habeas corpus litigation that this Court does not hold actions moot because through the passage of time or an intervening event, the aggrieved party cannot accomplish all that it would desire. In *Calderon v. Moore*, 116 S.Ct. 2066 (1996) (per curiam), a prisoner won a conditional grant of relief that required the State of California to release him unless it granted him a retrial within sixty days. The State appealed, and the federal courts denied its motions for stay. When it took steps to bring the petitioner to trial again, the Ninth Circuit dismissed the State's appeal as moot.

This Court reversed, reasoning that an appeal does not become moot as a result of an intervening event unless the "court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant," and that "even the availability of a 'partial remedy[ ]' is sufficient to prevent [a] case from becoming moot." 116 S.Ct. at 2067, quoting *Church of Scientology v. United States*, 506 U.S. 9, 13 (1992). Although the State still bore the burden of trying the petitioner while the federal habeas corpus appeal proceeded – and thus could not obtain all the relief it sought on appeal – the Court held that the appeal did not become moot simply because the State could not obtain all the relief it sought.

Here, as in *Calderon*, the aggrieved party cannot receive all the relief to which he was entitled when he

filed his petition: he has already served the remainder of his three-year prison sentence. A writ of habeas corpus cannot be "fully satisfactory." But, as in *Calderon*, the petitioner can still receive "partial relief" in the form of an order expunging the Board's order of revocation and the finding underlying it. One cannot say, therefore, that he cannot receive "any effectual relief whatever."

B. The same factors that keep criminal convictions alive after the release of the petitioner keep probation and parole revocations alive after the re-release or discharge of the petitioner.

Carafas involved a Fourth Amendment challenge to an underlying conviction and sentence. *Id.* at 240. In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court recognized a cause of action – remediable in federal habeas corpus – for constitutional violations in the process of revoking a person's parole. *See also Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation). In a federal habeas corpus action arising under *Morrissey* or *Gagnon*, the specific "custody" to be inquired into is not the underlying judgment and sentence, but the subsequent determination that the petitioner has violated the terms and conditions of his or her probation or parole, and that he or she should be re-incarcerated.

Spencer's case calls for the application of the principle of law in *Carafas* and *Evitts* to the right to a remedy this Court recognized in *Morrissey* and *Gagnon*. Because Spencer faces serious, non-speculative collateral consequences as a result of the official finding of wrongdoing that he sought to attack in the district court, his action is not moot.

C. Under Missouri and federal law, the statutory and other official collateral consequences of Spencer's unconstitutional parole revocation are not speculative, but gravely prejudicial.

Spencer's parole revocation for forcible rape and armed criminal action exposes him to enhanced sentences for a variety of crimes, as well as to impeachment should he be called as a witness in a civil or criminal matter. It exposes him to prejudicial testimony in federal trials under Rule 413. These collateral consequences flow from well-established rules of Missouri law, and of federal law to the extent it is observed in Missouri. Under recent decisions of this Court, Spencer cannot pursue a remedy under section 1983 if the respondents succeed in "mooting" his habeas corpus action.

1. A probation or parole violation renders a person subject to enhanced sentencing under federal and state sentencing statutes and guidelines.

Under subsection 4 of Mó. Rev. Stat. § 558.018 (Supp. 1996), a court of the State of Missouri "shall" sentence a citizen to life imprisonment *with* eligibility for parole but *without* eligibility for *discharge* from parole if it finds that he is a "predatory sexual offender." It provides that forcible rape is one of the prior offenses for such a finding. Subsection 5 defines "predatory sexual offender" to include a person who "[h]as previously committed an action which would constitute an offense listed in subsection 4 of this section, *whether or not the act resulted in a conviction*." (Emphasis supplied.) By its very terms, this enhancement provision is *mandatory* on the sentencing court.

No prosecutor has filed charges against Spencer on the basis of the parole violation report he challenged in the district court. If one *had* done so, and if a Missouri jury had *believed* that Spencer had raped the woman from the crack house; that a screwdriver was a "deadly weapon or dangerous instrument"; and that Spencer had "display[ed]" it "in a threatening manner" during the assumed rape, this additional hypothetical charge would have aggravated the case against Spencer from an unclassified felony to a "class A" felony. Mo. Rev. Stat. § 556.030.2 (Supp. 1992). If the jury had found that a screwdriver was a "dangerous instrument or deadly weapon," and that Spencer had raped the woman from the crack house "by, with, or through the use, assistance, or aid" of the screwdriver, Spencer could also have been convicted of the separate felony of "armed criminal action." Mo. Rev. Stat. § 571.015 (1994).

Missouri law regards the acts of which the Board found Spencer guilty as exceptionally serious. As a "class A" felon, he would have received a sentence of not less than ten years or as long as life imprisonment. Mo. Rev. Stat. § 558.011.1(1) (Supp. 1992). For "armed criminal action," Spencer would have received not less than three years up to life imprisonment, with this term to run consecutively to the term for the underlying felony. Mo. Rev. Stat. § 571.015.1 (1994). Thus, the additional accusation changed Spencer's sentencing exposure from a minimum of five years to a minimum of thirteen years and the potential for two consecutive life sentences.

As a quasi-judicial finding of guilt of forcible rape, this revocation would give the prosecution a prima facie case for subjecting Spencer to a sentence of life imprisonment without eligibility for discharge from parole if he were accused of any of the offenses listed in

subsection 4. These include attempted statutory rape, for which the sentence would otherwise be ten to twenty years. Mo. Rev. Stat. § 557.021.3(1)(a) (1994) (classification of substantive offense), § 564.011.3(1) (1994) (attempts), and § 566.032 (Supp. 1996) (defining and punishing substantive offense).

In Missouri the prosecution can adduce evidence of a parole violation to prove a "substantial history of serious assaultive criminal convictions" in the penalty phase of a capital trial. *State v. Nave*, 694 S.W. 2d 729, 738 (Mo. 1985) (en banc), *cert. denied*, 475 U.S. 1098 (1986). Such "evidence" would be admissible to negate the statutory mitigating circumstance of the absence of a "significant history of prior criminal conduct." Mo. Rev. Stat. § 565.032.3 (1994).

Under the Missouri Sentencing Guidelines, a sentencing judge would have to find that a parole revocation terminated a "substantial period[ ] of crime free living," and would thus eliminate or diminish a mitigating factor. Missouri Sentencing Advisory Commission, *Advisory Sentencing Guidelines Users Manual – 1997* at 18. *See* Mo. Rev. Stat. § 558.019.6 (Supp. 1996) (authorizing Guidelines).

State probation or parole revocations "count" under the United States Sentencing Guidelines. *See, e.g., United States v. Renfrew*, 957 F.2d 525, 526 (8th Cir. 1991) (applying U.S.S.G. § 4A1.1(d) (recency)). In assessing a defendant's criminal history, federal courts may consider allegations of uncharged conduct that is not even criminal, and of criminal conduct concerning which the court or the prosecution dismissed the relevant counts. U.S.S.G. § 1B1.4; *United States v. Snover*, 900 F.2d 107, 109-10 (8th Cir. 1990), *citing United States v. Williams*, 879 F.2d 454, 457 (8th Cir. 1989). If Spencer were accused of a federal crime, the state parole revocation based on triple hearsay from a

crackhead would be part of his Federal Sentencing Guidelines "history."

When a federal court finds that actual convictions do not adequately reflect the seriousness of a defendant's criminal history, the Sentencing Guidelines authorize an upward departure on the basis of "prior similar misconduct established by a civil adjudication or by a failure to comply with administrative orders." U.S.S.G. § 4A1.3. *See United States v. DeFilippis*, 950 F.2d 444, 447-49 (7th Cir. 1991) ("wealth of information" about uncharged conduct in presentence report); *United States v. Keys*, 859 F.2d 983, 989-91 (10th Cir. 1990) (prison disciplinary report). Against this legal background, a zealous federal prosecutor could not help himself or herself if offered the opportunity to introduce the outstanding parole violation report against Spencer.

Because the Federal Sentencing Guidelines apply throughout the country, the federal courts need not involve themselves in considerations of state law in determining the burdens they impose on probationers or parolees who have been revoked, nor evaluate the collateral consequences of probation and parole violations on a case-by-case basis. The *Sibron* presumption applies to these official determinations of wrongdoing, as well as to criminal convictions.

> **2. If a former probationer or parolee who has been revoked is called as a witness, he or she can be impeached with the revocation – to his or her prejudice as a victim of tort or crime, or as a presumptively innocent defendant in a criminal trial, and to the prejudice of third parties or the public in cases where he or she is an occurrence or expert witness who has no personal stake in the action.**

Under Missouri law an opponent may use a probation or parole violation to impeach a witness – including

the defendant in a criminal trial. *State v. Comstock*, 647 S.W.2d 163, 164-66 (Mo. Ct. App. 1983) (probation violation). Under Missouri law, as under the Federal Rules of Evidence, a finding of a parole violation for forcible rape and armed criminal action would be admissible to prove "character or a trait of character" where it is "an essential element of a charge, claim, or defense." Fed. R. Evid. 405(b); *Durbin v. Cassalo*, 321 S.W.2d 23, 25-26 (Mo. Ct. App. 1959) (collecting cases not even involving quasi-judicial finding). The finding would provide a good-faith basis for asking a reputation witness whether he or she was aware that Spencer had had his parole revoked for forcible rape and armed criminal action. Fed. R. Evid. 405(a); *State v. Sweet*, 796 S.W.2d 607, 614 (Mo. 1990) (en banc), *cert. denied*, 499 U.S. 1019 (1991).

Although state evidence law may vary as to the admissibility of probation and parole revocations, the Federal Rules of Evidence provide a basis for admitting these official determinations of wrongdoing throughout the country. Under present law, the considerations of comity and judicial economy that the Court found to justify a presumption of collateral consequences in *Sibron* apply to these determinations as well.

3. Fed. R. Evid. 413 allows the introduction of probation and parole revocations to the former probationer or parolee's prejudice in federal criminal trials.

Under Rule 413, Pub.L. 103-322, 108 Stat. 2136, "[i]n a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." The rule does

not require that the defendant have been *convicted* of the "previous" offense.

Thus, a probation or parole revocation for a sex offense would be admissible in a federal criminal trial if the probationer or parolee were accused of another sex offense. This new rule has the effect of *branding* a person a sex offender on the basis of any finding such as the Board's, which the district court refused to review because the respondents and the district court itself had delayed his case until his entire sentence had expired.

The Board of Probation and Parole revoked Spencer's parole on the basis of an official finding that he committed two extremely serious crimes of violence, one of which was forcible rape. It made this finding on the basis of triple hearsay about what a declarant experienced while she was voluntarily under the influence of crack cocaine. Under Rule 413, evidence of this revocation would come in even if the petitioner did not testify in his own defense. It is thus a collateral consequence separate from sentence enhancement and testimonial impeachment. Like sentencing consequences under the Federal Sentencing Guidelines, and "character" or "trait of character" evidence admissible under the Federal Rules of Evidence, this collateral consequence applies nationwide. On the basis of this novel collateral consequence, the *Sibron* presumption applies to probation and parole revocations involving sex offenses.

4. Under existing law, preclusion of section 1983 relief is a collateral consequence that even the court below recognized in another prisoner's case.

Spencer is also subject to a collateral consequence flowing from this Court's application of section 1983:

under *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), a person cannot seek damages under section 1983 for "allegedly unconstitutional conviction or imprisonment, or for other harms caused by actions whose unlawfulness would render a conviction or sentence invalid," unless he or she has first obtained an executive order or a state or federal court judgment (such as a writ of habeas corpus) "invalidat[ing]" the custody. But if Spencer cannot proceed with his federal habeas corpus action because he has been re-paroled and his sentence has expired, he cannot vindicate his federally-protected right to be free from unconstitutional revocation of his parole even by an after-the-fact award of damages.

Spencer has already litigated his claims in the state courts; he *had* to do so under 28 U.S.C. § 2254(b) & (c). Under *Heck*, he cannot receive relief under section 1983 unless he receives relief in federal habeas corpus; but the court below has held that his re-release on parole and the expiration of his sentence have shut him out of federal habeas corpus relief. That means he has *no relief at all* for the violation of his federal constitutional rights.

In *Leonard v. Nix*, 55 F.3d 370, 373 (8th Cir. 1995), the court below recognized that because a prisoner's section 1983 remedy depends on his or her having successfully litigated an attack on his or her custody in order to have a cognizable damages claim concerning it, the effect of denying a habeas corpus petition is *itself* a collateral consequence rendering it non-moot. Leonard challenged his placement in disciplinary detention for fifteen days and his placement on cell restriction for ninety days. *Id.* at 372.

A week before oral argument in the court below, the respondent moved to dismiss Leonard's appeal because he had been released from custody. Leonard replied that

"his separate civil rights damages claim under 42 U.S.C. § 1983 will be foreclosed if the habeas petition is denied." The court below agreed:

> Leonard's section 1983 action gives this case life, for if Leonard wins this habeas action, the state becomes vulnerable to his section 1983 claim. Leonard's petition is therefore not moot.

Id. at 373. *Accord*, *Thompson v. Thalacker*, 950 F.Supp. 1440, 1451-53 (N.D. Iowa 1996).

As in *Leonard*, the threat that the petitioner will receive no federal-court consideration *at all* for the violation of his federal constitutional rights is a collateral consequence precluding a finding of mootness.

Thus, Spencer does not rely on the effect of the Board's 1992 revocation of his parole on the likelihood of his release on parole as defeating the respondents' claim of mootness. Instead, he points to the *lifetime disabilities* of sentence enhancement (under both sentencing statutes and sentencing guidelines), testimonial impeachment, and admissibility of this parole revocation under Rule 413. In addition, under *Heck*, a denial of his habeas corpus action would foreclose his opportunity to seek the only other form of redress that the federal courts offer. Because this Court's post-*Lane* decision in *Heck* is one of federal law that applies generally to section 1983 claims concerning wrongful official detention, the federal courts need not evaluate collateral consequences of probation and parole revocations on a state-by-state or case-by-case basis. The *Sibron* presumption applies.

As a matter of Missouri and federal law, Spencer cannot prevent the Board's revocation of his parole from coming back to affect his legal rights: he is, instead, damned if he does and damned if he doesn't. If he is accused of *attempting* to have what *appeared* to be *consensual* sex with a girl who turned out to be thirteen, he is

subject to being sentenced to life imprisonment on account of the unconstitutional parole revocation for which the lower courts have refused to provide him a day in court. If he is accused of first-degree murder, the prosecution can use this revocation as evidence on the basis of which he could be sentenced to death. If he is charged with a federal sex offense, Rule 413 would allow the Government to introduce this official finding based on triple hearsay from a crackhead to deny him a fair trial.

On the other hand, if Spencer leads a blameless life, but is the victim of a crime or tort, the wrongdoer can – in a variety of circumstances – introduce this parole revocation to discourage the jury from vindicating Spencer's rights as an honest citizen. It requires no "speculation" to arrive at either set of conclusions: it is the law.

D. *Lane v. Williams* is not an obstacle to reversal, in that factual circumstances have changed since this Court rendered its decision in 1982, and Spencer does not *rely* on the collateral consequences that his 1992 parole revocation would have for any future parole consideration.

The court below refused to apply the rule of *Carafas* to a *Morrissey* habeas corpus action, citing this Court's decision in *Lane v. Williams*, 455 U.S. 624, 632 (1982). But *Lane* will not support the decision of the court below.

In *Lane*, two Illinois prisoners, Williams and Southall, sought to challenge their *underlying sentences*, as distinguished from *convictions*, based on pleas of guilty. Their intervening release on parole, revocation, return to custody, re-parole, and complete discharge from custody were *collateral* to their attack on the voluntariness of their pleas. Indeed, the record in *Lane* did not even indicate the

basis of the prisoners' parole revocations. 455 U.S. at 627-28.

In *Lane* neither prisoner contended that the Illinois parole officials had denied him a preliminary hearing on the most damaging allegation his parole officer cited in the violation report, or that the evidence against him was so insubstantial that the most lenient authoritative standards of due process would have precluded its use to revoke a citizen's probation or parole, or that he was not allowed to cross-examine the witnesses against him. This Court recognized this distinguishing fact when it said: "[Williams and Southall] have never attacked, on either substantive or procedural grounds, the finding that they violated the terms of their parole." 455 U.S. at 633.

It acknowledged that if these Illinois petitioners "had sought the opportunity to plead anew," *i.e.*, if they had attacked their *convictions*, "this case would not be moot," because "[s]uch relief would free [them] from all consequences flowing from their convictions. . . . " *Id.* at 630. These petitioners "elected only to attack their sentences," rather than their convictions or their parole revocations. *Id.* at 631. Their sentences were *facts* that had already occurred, and that the courts could not undo; the *official determinations of wrongdoing* in their convictions and in their parole revocations *could* be reversed or expunged. Because these petitioners challenged only the former, their actions were moot.

Unlike the prisoners in *Lane*, Spencer does not question the legitimacy of the term of parole supervision to which the State of Missouri subjected him. Unlike the petitioners in *Lane* – and like the petitioners in *Carafas* and *Evitts* – he challenges the official determination of serious wrongdoing that underlies the sanction he has suffered.

In *Lane*, this Court referred to *Sibron* and *Carafas* as reflecting a common doctrine. 455 U.S. at 631-32. Spencer recognizes the considerations of comity and judicial economy that support the *Sibron* presumption, 392 U.S. at 55-57 (citing cases), and advocates its application to probation and parole revocations as well as to criminal convictions. But he need not ask this Court to go so far in determining the collateral consequences in his case. Whether or not there are *Carafas*- or *Evitts*-class collateral consequences in *every* probation or parole revocation case, there are in *some* – and there certainly are in *his*. Spencer need not rely on the *Sibron* presumption, because he has proof.

In a footnote to this Court's citation of an Illinois case in *Lane*, this Court rejected a dissenting Member's argument, 455 U.S. at 639-40, that Williams's and Southall's cases were "not moot because a possibility exists under state law that [their] parole violations may be considered in a subsequent parole determination." 455 U.S. at 632 n.13. The Court rejected this argument for several reasons, the first of which was that this "possibility" simpliciter was distinguishable from the disabilities the Court cited in *Carafas*. It observed, as well, that "the existence of a prior parole violation does not render an individual ineligible for parole under Illinois law." Spencer does not rely on the effect that the Board of Probation and Parole's finding would have on any future parole consideration, but points to this consequence as only one factor among several. This reasoning from *Lane* is no obstacle to a disposition of this case in this favor.

In any event, it is disingenuous to suggest that when Spencer comes up for parole again, the Board of Probation and Parole will not take into account *its own finding* that Spencer was, in effect, guilty of "class A" forcible

rape and armed criminal action. Spencer's parole officer referred to a prior conviction and sentence in his initial violation report, as well as to the fact (if it is a fact) that he was a "registered" sex offender. J.A. 75. In the context of parole consideration, revocation of a previous grant of parole – on account of the Board's own finding that Spencer had committed forcible rape and armed criminal action *while on parole supervision* – is simply not a "speculative" factor. Yet in light of the other collateral consequences of the Board's finding, this Court need not find such effects to be a sufficient condition of reversing the court below.

In the same footnote to its 1982 decision, the Court also said that the prisoners' parole violation records would not affect their subsequent consideration for parole unless they commit new crimes, which they have a duty to refrain from doing. Three years later, this Court decided *Evitts*, and expressly relied on sentence enhancement as one of two bases for rejecting a defense of mootness even when the prisoner had been "finally released from custody" *and* when the sentencing jurisdiction had restored his "civil rights, including suffrage and the right to hold public office." 469 U.S. at 391 n.4. It was just such civil disabilities that the Court had relied on in *Carafas* when rejecting the defense of mootness. 391 U.S. at 237. In *Evitts*, therefore, this Court adopted sentence enhancement and testimonial impeachment as alternative, sufficient conditions of holding criminal convictions nonmoot after the convicted citizen has served the resulting sentence and has had his or her civil rights restored. Yet in such cases one could argue with equal force that the person could avoid the effect of sentence-enhancement statutes by obeying the law in the first place.

On the basis of the facts before it in 1982, and on the basis of Illinois state law, *Lane* says that "[a]t most, certain non-statutory consequences may occur" as a result of a finding that a person violated the conditions of his or her parole. 455 U.S. at 632. The "non-statutory consequences" to which the Court alluded were employment discrimination and the fact that "the sentence imposed in a future criminal proceeding . . . *could* be affected." *Ibid.* (emphasis supplied). Congress subsequently enacted the Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 2017, which created the United States Sentencing Commission, and directed it to promulgate the Federal Sentencing Guidelines. 28 U.S.C. §§ 991 & 994(a)(1). Congress also adopted Rule 413. When the consequences for sentencing *are* statutory – either by virtue of sentencing statutes such as Mo. Rev. Stat. § 558.018 or by virtue of federal and state sentencing guidelines promulgated under a statute – the language quoted from *Lane* does not apply. It does not mean that Spencer's parole revocation claim is moot when there certainly are *statutory* and common-law consequences identical or analogous to the ones on which *Carafas* and *Evitts* relied. *Lane* rejected the *Sibron* presumption; but Spencer does not rely on it. On the facts of his case, his claim is not moot.

E. The decision of the court below would change the law from what the courts and Congress have accepted since this Court announced its decision in *Lane v. Williams*.

Whereas the disposition Spencer proposes for deciding whether probation or parole revocations have become moot on the probationer's or parolee's release from confinement or discharge from sentence would be *consistent*

with the weight of judicial authority since *Lane*, the decision of the court below would *repudiate* this experience. Such a change in the law would be unfounded as a matter of public policy: Congress has recently reviewed the availability of federal habeas corpus relief, and has not abrogated the dominant authority supporting Spencer's position.

1. The other courts of appeals that have examined the issue of applying *Carafas* and *Evitts* to probation and parole revocations and other official findings of wrongdoing support Spencer's position.

In its opinion allowing the respondents and the district court to run down the clock on Spencer's federal constitutional claims, the court below *acknowledges* that *United States v. Parker*, 952 F.2d 31, 33 (2d Cir. 1991), and *Robbins v. Christianson*, 904 F.2d 492, 495-96 (9th Cir. 1990), would allow a finding of collateral consequences such as the ones in this case to overcome a defense of mootness. J.A. 135.

Respondents sought to distinguish *United States v. Parker*, 952 F.2d 31 (2d Cir. 1991) (per curiam), by arguing that the Second Circuit relied on "New York statutory law" in finding that Parker's federal probation violation was "likely to effect future parole consideration." BIO 7-8. In subdivision II.C. of this brief, Spencer has documented that under Missouri law and federal law, the challenged parole revocation is admissible to his substantial prejudice in a variety of civil and criminal proceedings. Spencer may have occasion to travel to New York or some other state where a past parole revocation from another jurisdiction would have even more damaging effects on his legal rights.

Before the *Parker* court *reached* the specific collateral consequences Ms. Parker faced under *New York* state law, moreover, it rejected the Government's argument that *Lane v. Williams* precluded it from reaching the merits of the petitioner's case. It discussed decisions from the Fifth, Seventh, Ninth, and District of Columbia Circuits applying *Lane*, and concluded that they had viewed as "dispositive" the distinction between attacking only one's sentence, on the one hand, and attacking either the underlying conviction or the probation or parole violation, on the other. *Parker*, 952 F.2d at 33, *citing D.S.A. v. Circuit Court Branch 1*, 942 F.2d 1143 (7th Cir. 1991); *Robbins v. Christianson*, 904 F.2d 492 (9th Cir. 1990); *United States v. Spawr Optical Research, Inc.*, 864 F.2d 1467 (9th Cir. 1988), *cert. denied*, 493 U.S. 809 (1989); *United States v. Maldonado*, 735 F.2d 809 (5th Cir. 1984); and *United States v. Cooper*, 725 F.2d 756 (D.C. Cir. 1984) (per curiam).

In *Parker* the Government appeared to have interpreted this Court's discussion in footnote 13 of *Lane* to mean that a record of parole violations can *never* be a collateral consequence for the purpose of mootness inquiries. The Second Circuit replied:

> In cases where a convict directly attacks his or her conviction or *finding of parole violation*, courts have, as a general rule, considered *a wider spectrum of collateral effects* in deciding whether a case is moot. Thus, potentially negative effects on testimonial credibility, future bail adjustments, future criminal sentences, and potential employment discrimination have been found sufficiently injurious to sustain the vitality of a controversy.

952 F.2d at 33 (emphasis supplied), citing *D.S.A.*, 942 F.2d at 1148-50; *Robbins*, 904 F.2d at 494-95; and *Maldonado*, 735 F.2d at 812-13. Finding that the federal parole violation in

question was "likely to influence the state parole authority to [the prisoner's] detriment," the Second Circuit held that her claim was not moot, and addressed the merits of her attack on the violation. *Id.* at 33-34.

Robbins v. Christianson did not involve a probation or parole revocation, but a prison disciplinary proceeding in which federal corrections officials gave Robbins a conduct violation, transferred him from a halfway house to a prison camp, and denied him sixty days of good-time credit on the basis of a single urine sample they believed to show the use of illegal drugs. They failed to provide him a copy of the conduct violation report until the time to seek administrative review had expired. Robbins filed a federal habeas corpus action, and while the action was pending, he completed the sentence for tax evasion he had been serving at the time of the urine test. The district court dismissed his action as moot. 904 F.2d at 493-94.

The Ninth Circuit acknowledged this Court's holding in *Lane*, and observed that *Lane* did not apply because Robbins was attacking the disciplinary action rather than his underlying conviction or sentence. 904 F.2d at 494-95. Only after reaching this conclusion of law – diametrically opposed that of the court below on the same point – did it consider what collateral consequences would keep a claim alive once a person's sentence has expired.

The Ninth Circuit discussed, first, the effect of an official finding of illegal drug use on the petitioner's sentencing exposure if he were charged with a federal drug offense. It cited the Federal Sentencing Guidelines as "permit[ting] a court to impose more restricted sentences and release conditions on those defendants who have histories of substance abuse." U.S.S.G. § 5B1.4(b)(23) & § 5H1.4. It observed that the Guidelines "permit a court to depart [upward] based on a defendant's involvement

in prior civil adjudications or a defendant's failure to comply with administrative orders." U.S.S.G. § 4A1.3(c). It noted that a prison disciplinary record such as Robbins's could be the basis for such a finding under the Guidelines. 904 F.2d at 495, citing *United States v. Keys*, 899 F.2d at 985, 989-90.

The Ninth Circuit observed that in *Evitts*, this Court had held that a habeas corpus attack on a criminal conviction did not become moot on the expiration of the sentence challenged because the sentence could be used to enhance a later sentence. 904 F.2d at 495-96, citing 469 U.S. at 391 n.4. Accordingly, it reasoned that it was better to examine the petitioner's grievance sooner rather than later. 904 F.2d at 496, *citing Sibron*, 392 U.S. at 56.

Having established a sufficient basis for reversing the district court, the Ninth Circuit also discussed the effect of the revocation on Robbins's employment opportunities. In a single paragraph, it held that it "could not fully discount" this risk. It then returned to the general odium attached to illegal drug use – a factor equally applicable to sentence enhancement and employment discrimination. 904 F.2d at 496.

In *D.S.A. v. Circuit Court Branch 1*, 942 F.2d 1143 (7th Cir. 1991), the Seventh Circuit held that under this Court's decisions, an official act which imputes serious wrongdoing to a citizen is a sufficient collateral consequence to defeat a claim of mootness. *Id.* at 1148-49. *D.S.A.* involved a Wisconsin juvenile adjudication that an eleven-year-old had participated in the murder of a nine-year-old.

The Seventh Circuit quoted *Evitts* for the proposition that liability to impeachment as a witness and to enhanced sentencing suffice to render a conviction non-moot after the convicted citizen has served his or her

sentence. 469 U.S. at 391 n.4. It cited opinions from the Fourth, Ninth, Tenth, and Eleventh Circuits relying on both sentence enhancement and testimonial impeachment as preventing mootness. 942 F.2d at 1149 n.9, citing *White v. White*, 925 F.2d 287, 290 (9th Cir. 1991); *Sanchez v. Mondragon*, 858 F.2d 1462, 1463 n.1 (10th Cir. 1988); *Broughton v. North Carolina*, 717 F.2d 147, 149 (4th Cir. 1983); *Malloy v. Purvis*, 681 F.2d 736, 740 (11th Cir. 1982) (Wisdom, J.), *quoting Harrison v. Indiana*, 597 F.2d 115, 118 (7th Cir. 1979).

The Seventh Circuit noted that under Wisconsin law, the juvenile adjudication "could be used in a presentence report to increase a subsequent sentence." 942 F.2d at 1150. In Missouri, it is the Board of Probation and Parole staff that *prepares* presentence investigation reports. Mo. Rev. Stat. § 217.760 (1994).

The principal case one can cite as *supporting* the decision of the court below is one that *cites it* while recognizing its conflict with *Parker* and *Robbins*. *Lane v. Kindt*, 97 F.3d 1464, 1996 WL 532119 (10th Cir. Sept. 19, 1996) (table). This case involved a challenge to the U.S. Parole Commission's jurisdiction to revoke a federal prisoner's previous order releasing him on parole, when he had already litigated it in federal habeas corpus and lost, then had been re-paroled and revoked again. Without acknowledging the existence of testimonial impeachment, sentence enhancement, Rule 413, or preclusion of section 1983 relief, the Tenth Circuit asserted: "Parole revocation does not have the collateral consequences of a criminal conviction that permit courts to hear a challenge to a conviction after the sentence has expired."

The Tenth Circuit cites *Johnson v. Riveland*, 855 F.2d 1477, 1480-82 (10th Cir. 1988). *Johnson* provides no *precedential* support at all for the Tenth Circuit's position. Like

the petitioners in *Lane v. Williams*, Johnson did not attack *either* a conviction *or* a parole revocation, but the calculation of a *sentence*.

After discussing the defense of mootness, the Tenth Circuit's *Lane v. Kindt* opinion holds that the district court correctly denied the petition as successive. Because it cites the opinion of the court below as a basis for unnecessarily finding a prisoner's claim moot in the face of the contrary authority correctly applying this Court's decisions in *Carafas*, *Lane*, and *Evitts*, the Tenth Circuit's decision is an additional reason for reversing the judgment of the court below.

2. Because the law at the time Congress adopted AEDPA allowed probation or parole revocation claims to proceed on these facts, the enactment of AEDPA implies legislative intent to allow them to do so.

At the time Congress recently revisited the scope of federal habeas corpus jurisdiction under section 2254 in adopting AEDPA, the court below had not issued its decision in this case. The Second, Seventh, and Ninth Circuit decisions Spencer has discussed in this brief – and those of the *other* courts that these decisions cite – *had* construed the statute to allow persons situated similarly to this petitioner to continue litigating timely filed habeas corpus actions even after they had been released from physical custody or otherwise discharged from the immediate restraint that their petitions had challenged.

In interpreting a statute, one presumes that Congress knows the law, including judicial precedent. *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). When Congress

debated and adopted AEDPA, it was on notice that a majority of United States Courts of Appeals – if not *all* of them with published opinions on the subject – had held that collateral consequences such as the ones in this case sufficed to defeat a defense of mootness. If actions such as Parker's, Robbins's, D.S.A.'s, and Spencer's seemed troublesome to Congress – rather than part of the relief it intended to provide in enacting a federal habeas corpus statute – it could have attempted to "correct" the body of law the other circuits have created on the basis of *Carafas* and *Evitts*.

F. Reversal is necessary to deter the knowing denial of a day in court to probationers and parolees who seek redress for federal constitutional violations.

In *Lane v. Williams*, there is no suggestion of bad faith on the part of the respondents or the district court. Respondents' and the district court's knowing delay – as documented in the statement of the case and joint appendix, and as discussed in Spencer's first point – is sufficient to distinguish this case from *Lane*.

Although the facts in this case are egregious, Spencer's situation is far from unique. The practical effect of letting the lower court's decision stand would be that respondents and district courts could avoid decisions enforcing federal constitutional rights of probationers and parolees by running down the clock until their claims become "moot."

Jurisdictions including the United States are steadily requiring prisoners to be imprisoned for greater proportions of the time to which trial courts sentence them. *See, e.g.*, 42 U.S.C. § 13704; Mo. Rev. Stat. § 558.019.3 (1994). As the length of time prisoners are on parole decreases,

the temptation to run down the clock on meritorious constitutional challenges to probation and parole revocations increases. This combination of factors creates an incentive to play fast and loose with the federal constitutional rights of probationers and parolees – like Randy Spencer – whom a crackhead or an enemy turns in for a parole violation, whether or not they are guilty of it.

Allowing official conduct of the type the court below *did not even choose to address* would send a message that if a probationer or parolee is within two and a half *years* of his or her maximum release date, then *Morrissey* and *Gagnon* are dead letters, and the probationer or parolee has no rights the government is bound to respect. That cannot be the law.

CONCLUSION

WHEREFORE, the petitioner prays the Court for its order that the judgment of the court below be reversed, and for such other relief as law and equity indicate.

Respectfully submitted,

INGLISH & MONACO, P.C.

JOHN WILLIAM SIMON
Counsel of Record

DAVID G. BANDRÉ

237 East High Street
Jefferson City, Missouri 65101

(573) 634-2522

Attorneys for Petitioner